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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

Petitioner,

v.

RAYMOND EUGENE JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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INTRODUCTORY STATEMENT

The Statement of the case presented in the Brief for the United States is accepted except as indicated in the Argument herein.

SUMMARY OF ARGUMENT

Despite the fact that the warrantless arrest of respondent in his home occurred before this Court's decision in *Payton v. New York*, 445 U.S. 573 (1980) and the Ninth Circuit's decision in *United States v. Prescott*, 581 F.2d 1343 (1978), the principles announced therein should be applied to respondent. The application of *Payton* and *Prescott* to this case is appropriate under the analysis of retroactivity as expressed in *United States v. Peltier*, 422 U.S. 531 (1975).

Although the *Peltier* analysis focuses on whether the law enforcement officer had knowledge, or may be properly charged with knowledge, that the arrest was unconstitutional under the Fourth Amendment, petitioner erroneously contends that *Peltier* precludes an analysis of whether *Payton* and *Prescott* declared new law or merely reaffirmed existing consitutional principles. There is nothing in *Peltier* which would suggest that such an inquiry is foreclosed or is not relevant to the issue of the officer's knowledge of the legality of his conduct. Contrary to petitioner's contention, such an inquiry is highly relevant and becomes crucial in light of the *Peltier* analysis of whether a law enforcement officer knew or should have known that his conduct was not in accordance with the law. By foreclosing such inquiry, it would be virtually

impossible to address the question of the knowledge chargeable to a law enforcement officer.[1]

Although at the time of respondent's arrest the Supreme Court and the Ninth Circuit had expressly reserved deciding the issue of the constitutionality of warrantless arrests in the home, prior Supreme Court and Ninth Circuit decisions clearly set the stage for the ultimate ruling in *Prescott* and *Payton* and provided more than adequate forewarning to law enforcement officers that this issue would be resolved against their interests. See *Johnson v. United States*, 337 U.S. 10 (1948); *United States v. Watson*, 423 U.S. 411 (1976); *United States v. Santana*, 427 U.S. 38 (1976); *United States v. Calhoun*, 542 F.2d 1094 (9th Cir. 1976); *United States v. Phillips*, 497 F.2d 1131 (9th Cir. 1974).

Of critical import is the government's concession of this issue in *United States v. Calhoun*, 542 F.2d 1094 (9th Cir. 1976), and the warning of Hon. Warren J. Ferguson, United States District Judge for the Central District of California, in *United States v. Rombouts*, United States District Court No. Cr. 76-1540-F, that he was of the opinion that warrantless arrests in the home in the absence of exigent circumstances were illegal.

Moreover the deterrent purpose of the exclusionary rule provides an independent justification for the retroactive application of *Prescott* and *Payton* in this case in light of the actions of the arresting agents. The egregious conduct of Agents Hemenway and Pickering, who had previously obtained a warrant for the arrest of co-defendant, Dodd, in

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[1]As succinctly stated in *United States v. Ross*, 655 F.2d 1159, 1163 n.5 (D.C. Cir.) (en banc) cert. granted, No. 80-2209 (Oct. 13, 1981):

> If a decision develops no new law, then the police officer—who is charged with knowledge of the old law—should have known, and acted in a manner consistent with, the core doctrine.

entering respondent's home with guns drawn, conducting a cursory search of his home, and commandeering respondent and his wife, knowing that they did *not* have probable cause to arrest respondent, provides independent justification for retroactive application of *Prescott* and *Payton*.

Finally, the fact that this case was pending on direct review at the time of the *Payton* and *Prescott* decisions compels the retroactive application of the principle set forth in *Payton* and *Prescott*. The refusal to afford such retroactive application would result in the unequal administration of justice which result should be scrupulously avoided.

ARGUMENT

A. THE DECISIONS REQUIRING WARRANTS FOR ARRESTS IN A HOME ABSENT EXIGENT CIRCUMSTANCES MUST BE APPLIED RETROACTIVELY TO THIS CASE TO SUPPRESS EVIDENCE ILLEGALLY OBTAINED BY THE AGENTS

In *United States v. Peltier*, 422 U.S. 531 (1975), the Court fashioned a new approach in deciding Fourth Amendment exclusionary rule retroactivity cases. Pursuant to the *Peltier* analysis of retroactivity, the pivotal issue is whether the law enforcement officers' conduct was based upon a good faith reliance on existing constitutional standards. This analysis focuses on whether the law enforcement officers had knowledge or may be properly charged with knowledge that their conduct was in violation of existing constitutional standards. Petitioner, in urging this Court to apply *Peltier* and in actually applying *Peltier* to this case, erroneously interprets *Peltier* as

precluding an analysis of whether *Payton* and *Prescott* declared new law or merely reaffirmed existing constitutional principles. Relying on Judge Wilkey's dissenting opinion in *United States v. Ross*, 655 F.2d 1159 (D.C. Cir. 1981) (en banc) cert. granted, No. 80-2209 (October 13, 1981), petitioner specifically contends that in assessing the knowledge properly chargeable to the law enforcement officers it is inappropriate to determine whether or not *Prescott* or *Payton* declared new law.

The obvious flaw in petitioner's proferred application of *Peltier* is exposed by Judge Ginsburg's cogent response to Judge Wilkey in *United States v. Ross, supra*, wherein he states:

> Judge Wilkey's dissenting opinion, . . . urges that the Supreme Court's opinion in *Peltier* precludes this court from asking whether *Sanders* declared new law. It is true that the Court in *Peltier* did not set out this consideration as a separate inquiry, directing the courts instead to ask whether the police officer knew or should have known that his conduct was in accordance with the law. We believe, however, that the former inquiry is subsumed in the latter. If a decision develops no new law, then the police officer—who is charged with knowledge of the old law—should have known, and acted in a manner consistent with, the core doctrine.

655 F.2d at 1163, n.5.

Although *Peltier* may restyle the ultimate and critical issue to require an answer to the question of whether the law enforcement agents had knowledge or can they be charged with knowledge that their conduct was violative of the Fourth Amendment, the answer must continue to include an analysis of whether the constitutional principle is "new". If the constitutional principle under examination does not consti-

tute a sharp break in the law or if it was clearly foreshadowed, the law enforcement officers must necessarily be charged with knowledge that their actions were illegal.

The analysis of the court in *United States v. Ross, supra*, is instructive in this regard. In *Ross*, the court held that the Supreme Court's decision in *Arkansas v. Sanders*, 442 U.S. 753 (1979) that warrantless searches of luggage taken from automobiles in absence of exigent circumstances violate the Fourth Amendment applied retroactively to searches of closed containers seized from automobiles. In so holding, the court, in determining retroactivity in light of *Peltier*, concluded that the *Ross* facts were easily distinguishable from *Peltier*. In *Peltier*, the practice in question had received continuous judicial approval and was premised on a validly enacted statute. In *Ross*, there had been little, if any, judicial approval of the practice in issue which fact must have, at the least, created a substantial doubt in law enforcement officers' minds about the issue. The court resolved the issue by stating:

> *[D]oubts police officers may entertain are to be resolved in favor of, not against, the main rule that a warrant precede a search.* We cannot invert the Supreme Court's instructions by sanctioning police conduct of warrantless searches, subject only to the court's prior express mandate that they obtain a warrant. Rather, *we are required to adhere to the Court's command that the police obtain a warrant unless their search falls within one of the express and narrowly drawn exceptions to the warrant requirement.* Read against this background, the Court's statement in *Peltier*, that a retroactivity ruling is impermissible when a police officer believes "in good faith" that his conduct is "in accordance with the law," 42 U.S. at 538, 95 S.Ct. at 2318, must mean that [the police officer] had to believe, in good faith, that his conduct fell within one of the few, jealously drawn exceptions to the warrant requirement. In sum, if [he]

> had doubts about the meaning of *Chadwick*, he should have followed the presumption laid down in numerous Supreme Court decisions and obtained a warrant. His doubts, even after *Peltier*, should not have been resolved against the warrant requirement. (Footnotes omitted; emphasis added)

655 F.2d at 1164.

Regardless of how the inquiry is styled, in ruling on a Fourth Amendment exclusionary rule issue of retroactivity the question of whether the constitutional principle at issue is "new" must be considered. Even under the *Peltier* analysis, the state of the law must be examined in order to analyze the knowledge properly chargeable to the law enforcement agents. In this case, there is no question that *Payton* and *Prescott* merely applied familiar and longstanding constitutional principles and did not establish a new principle of law. Based upon the nature and extent of foreshadowing opinions on this issue, and the fact that Agents Pickering and Hemenway obtained an arrest warrant for co-defendant, Dodd, it can be concluded that the agents had more than sufficient knowledge of the illegality of their conduct in making the warrantless arrest of respondent in his home and, therefore, the evidence in this case must be suppressed.

(1) PRIOR SUPREME COURT DECISIONS CLEARLY FORESHADOWED THE *PAYTON* DECISION

Ahtough prior to *Payton* the Court had not expressly decided whether law enforcement officers must secure a warrant prior to entering a private residence to effect an

arrest, this grave constitutional question had been expressly reserved in a number of prior decisions. *Payton v. New York*, 445 U.S. 573, 574 (1980). The prior decisions of the Court clearly set the stage for the ultimate ruling in *Payton* and provided adequate forewarning to all observers, especially law enforcement agents, that the resolution of this issue would be adverse to law enforcement. The Court's persistent avoidance signaled judicial sensitivity to the issue which compelled law enforcement officers to recognize, however painful, that the Fourth Amendment required them to obtain a warrant prior to entering a residence to effect an arrest absent exigent circumstances. Certainly, if law enforcement officers seriously entertained any doubts regarding the Court's ultimate resolution of the issue, they should have resolved such doubts in favor of obtaining a warrant in light of the absolute absence of any statutory authority or Supreme Court decision condoning such warrantless arrests.

An uninterrupted line of authority commencing with *Johnson v. United States*, 337 U.S. 10 (1948), repeatedly emphasized the special sanctity afforded the home in the application of the Fourth Amendment. *United States v. Martinez-Fuerte*, 420 U.S. 542 (1976), *United States v. United States District Court*, 407 U.S. 297 (1972). The creation of an exception to the Fourth Amendment warrant requirement for arrests in *public* places underscored the distinction between home and public arrests. *United States v. Watson*, 423 U.S. 411 (1976).

This narrow exception was illustrated in *United States v. Santana*, 427 U.S. 38 (1976), where the Court took painstaking care to distinguish a "public" versus "private" place. 427 U.S. at 42-43. However, as it had done repeatedly

in the past,[2] the Court declined to settle the oft-reserved question of whether and under what circumstances law enforcement agents may enter a home of a suspect to make a warrantless arrest.

The Court's deliberate and thorough analysis in distinguishing public versus private places as the arena for an arrest should have provided any reasonable person with notice of the natural extension of the argument that no warrantless arrests inside a home, absent exigent circumstances, would be sanctioned.

Indeed, in *Coolidge v. New Hampshire*, 403 U.S. 443, 477-478 (1971), the Court, while finding it unnecessary to decide the ultimate question whether warrantless arrest entries into a home were unconstitutional, stated:

> [T]he notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well-defined "exigent circumstances."

Certainly, this language was a clear warning to law enforcement officers that the Court would ultimately resolve this conflict in favor of the Fourth Amendment and condemn warrantless home arrests in the absence of exigent circumstances.

More importantly, it is inconceivable that the Court's continuous reservation of such a grave constitutional issue could have been interpreted as granting law enforcement

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[2] *United States v. Watson*, *supra*, at 418 n. 6; *Gerstein v. Pugh*, 420 U.S. 103, 113 n.13 (1975); *Coolidge v. New Hampshire*, 403 U.S. 443, 480-81 (1971); *Jones v. United States*, 357 U.S. 493, 499-500 (1958).

officers carte blanche to make warrantless home arrests. In view of the careful analysis of the boundary of public versus private portions of the dwelling in *Santana*, and in view of strong warnings in *Coolidge* and subsequent cases expounding on the need for a specific exception to justify a warrantless home arrest, any reliance by law enforcement officers on *Watson*, *Santana*, *Coolidge* or any other Supreme Court case on the issue of the constitutionality of a warrantless arrest entry into a home was totally unjustified. In *Steagald v. United States*, 101 S.CT. 1642 (1981), decided subsequent to *Payton*, the Court acknowledged the consistency of prior decisions in condemning warrantless arrest entries into a home.

> Except in such special situations [consent or exigent circumstances], we have *consistently held* that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant. See *Payton v. New York*, 445 U.S. 573, 63 L.Ed. 2d 639, 100 S.Ct. 1371 (1980); *Johnson v. United States*, 333 U.S. 10, 13-15, 92 L.Ed. 436, 68 S.Ct. 367 (1948). (Emphasis added)

101 S.Ct. at 1647.

The plain purport of the pre-*Payton* decisions discussing this issue required even the most unsophisticated law enforcement officer to predict the result in *Payton*. *Payton* did no more than reaffirm and apply long-established principles of the Fourth Amendment that were common knowledge to even the working partolman; viz., any doubt regarding the necessity of an arrest warrant should have been resolved in

favor of securing a warrant as prescribed by the Fourth Amendment.[3]

(2) PRIOR DECISIONS IN THE NINTH CIRCUIT CLEARLY FORESHADOWED THE *PRESCOTT* DECISION

Although the Court had expressly reserved this constitutional question, many state and federal courts had decided the issue of the constitutionality of warrantless home arrests prior to respondent's arrest.[4] These cases establish unequivocal support for the conclusion that the federal law enforcement officers in this case had more than adequate notice, and therefore the knowledge required by *Peltier*, of the unconstitutionality of their warrantless arrest of respondent.

It is important to note that although prior to its opinion in *Prescott* the Ninth Circuit had on many occasions discussed the issue of warrantless home arrests, it did not clearly decide

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[3]To allow law enforcement officers unfettered discretion to resolve such doubts in a manner inconsistent with the Fourth Amendment by adopting a "let's wait-until-it's-decided approach" is a frightening prospect. As stated by Justice Brennan in his dissenting opinion in *Peltier*, quoting from Justice Fortas' dissenting opinion in *Desist v. United States*, 394 U.S. 244, 277 (1969):

> History does not embrace the years needed for us to hold, millimeter by millimeter, that such and such a penetration of individual rights is an infringement of the Constitution's guarantees. The vitality of our Constitution depends upon conceptual faithfulness and not merely decisional obedience. Certainly, this Court should not encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach.

422 U.S. at 449.

[4]See citations in *Payton* at 575-576, n.3. and 4.

the issue until *Prescott*. However, the decisions relied on by *Prescott* support the conclusion that law enforcement agents in the Ninth Circuit had ample reason to know that the "practice" of conducting warrantless arrests in homes would be determined to be constitutionally impermissible.

In *United States v. Calhoun*, 542 F.2d 1094 (9th Cir. 1976), involving a 1974 arrest, the government conceded[5] that "absent exigent circumstances, the entry [into defendant's apartment] would be illegal." 542 F.2d at 1102. The court then found that there were no exigent circumstances and held the evidence seized pursuant to the arrest should have been suppressed. 542 F.2d at 1102-1103. Although the government's concession regarding the necessity of an arrest warrant foreclosed the Ninth Circuit from deciding the issue, the concession was an unequivocal and authoritative state-

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[5]Although the specific circumstances resulting in the government's apparent concession of the arrest warrant issue are not discussed in the opinion, it is clear that the government conceded that an arrest warrant was required to arrest a person in his home. The government's concession obviously was the result of the government's belief that a warrantless arrest in a home, absent exigent circumstances, would be condemned by the court. The government's knowledge of the warrant requirement must be chargeable to federal law enforcement agents in the Ninth Circuit.

As noted in the Brief for the United States at 32-33, n.20, in 1978 the Justice Department apparently instructed federal law enforcement agencies that arrest warrants should be obtained prior to entering a suspect's home in the absence of exigent circumstances. Although the Justice Department's memorandum was in response to *United States v. Reed*, 572 F.2d 412 (2d Cir.) cert. denied, 439 U.S. 913 (1978), its advice to law enforcement officers in the Ninth Circuit was at least two years late in light of the government's concession in *Calhoun, supra*. Surely the government should not be permitted to rely on the Justice Department's failure to timely advise federal law enforcement officers in the Ninth Circuit of the state of the law on this issue in support of its argument that agents Pickering and Hemenway had a good faith belief that their conduct was permissible.

ment to law enforcement agents of the government's recognition of the constitutional requirement of an arrest warrant prior to entry into a private dwelling.[6]

Similarly, in *United States v. Phillips*, 497 F.2d 1131 (9th Cir. 1974), the court considered the warrant requirement where officers entered a private dwelling (commercial building) to effect an arrest. The court analyzed whether the warrantless entry was justified relying on the criteria established in *Dorman v. United States*, 435 F.2d 385, 390 (D.C. Cir. 1970). However, in *Phillips, supra*, the court again was not required to decide the arrest warrant issue because it concluded that the arrest was illegal on the grounds that the agents lacked probable cause to believe that the defendant was in the building. 497 F.2d at 1135-1136.

Numerous other Ninth Circuit cases clearly and unmistakenly established that the only conceivable justification of a warrantless arrest inside a home in the Ninth Circuit would be the existence of exigent circumstances. See *United States v. Bustamante-Gamez*, 488 F.2d 4, 8 (9th Cir. 1973), cert. denied 416 U.S. 970 (1974); *United States v. McLaughlin*, 525 F.2d 517, 520 (9th Cir. 1975), cert. denied, 427 U.S. 904 (1976); *United States v. Flickinger*, 573 F.2d 1349, 1354 (9th Cir.), cert. denied, 439 U.S. 836 (1978).

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[6]The significance of the government's concession in *Calhoun* is demonstrated by comments in the *Preliminary Draft of Proposed Amendments To The Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, Rules Governing Section 2255 Proceedings for the United States District Courts, and Federal Rules of Evidence*, 77 F.R.D. 507 (1978) wherein the Advisory Committee, of which former Attorney General Griffin Bell was a member, indicated: "There exists some authority, however, that except under exigent circumstances a warrant is required to enter the defendant's own premises, *United States v. Calhoun*, 542 F.2d 1094 (9th Cir. 1976); . . . ." 77 F.R.D. at 586.

In light of the plain purport in *Calhoun* and *Phillips* that a warrant would be required in effecting an arrest in a residence, it is clear that the Ninth Circuit's opinion in *Prescott* did not constitute a startling departure from any longstanding or widespread acceptable practice condoned by the court.[7] The clear import of prior Ninth Circuit cases was that warrantless arrest entries into the home were absolutely unacceptable absent exigent circumstances. Accordingly, the law enforcement officers in this case had more than adequate forewarning and are chargeable with knowledge that respondent's arrest would be illegal.[8]

Moreover, the distinct trend in other Courts of Appeals even prior to respondent's arrest was to hold warrantless home arrests unconstitutional. *Dorman v. United States*, 45 F.2d 385 (D.C. Cir. 1970); *United States v. Shye*, 492 F.2d 886 (6th Cir. 1974); *United States v. Killebrew*, 560 F.2d 739 (6th Cir. 1977). The First, Third and Fourth Circuits had also established that warrantless home arrests were

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[7]The "longstanding, widespread practice" referenced in *Payton* applied to state court decisions only. 445 U.S. at 599-600.

[8]In February 1977, Hon. Warren J. Ferguson, United States District Court Judge for the Central District of California, advised the government in *United States v. Rombouts*, U.S. District Court No. Cr. 76-1540-F that he subscribed to the principles of *People v. Ramey*, 16 C.3d 263, 127 Cal. Rptr. 629 (1976) and *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1979). Specifically, Judge Ferguson advised that it was his view that an unconsented entry by law enforcement officers into a private dwelling to make a warrantless arrest on probable cause, absent exigent circumstances, violates the Fourth Amendment. Although we cannot categorically state that Judge Ferguson's admonition was formally communicated to federal law enforcement agencies in the Central District, it is submitted that it probably was disseminated to law enforcement agencies because of the dramatic impact it would have on future prosecutions before Judge Ferguson. Respondent's arrest occurred approximately three months after Judge Ferguson's admonition.

unconstitutional, although by assumption. *United States v. Bradley*, 455 F.2d 1181 (1st Cir. 1972); *United States v. Davis*, 461 F.2d 1026 (3rd Cir. 1972); *Vance v. North Carolina*, 432 F.2d 984 (4th Cir. 1970). At about the time of respondent's arrest, the Second and Eighth Circuits had joined the trend. *United States v. Reed*, 572 F.2d 412 (2nd Cir.), cert. denied *sub nom. Goldsmith v. United States*, 439 U.S. 913 (1978); *United States v. Houle*, 603 F.2d 1297 (8th Cir. 1979). The Fifth and Seventh Circuits were the only two Circuits that had decided that such arrests were constitutional. *United States v. Williams*, 573 F.2d 348 (5th Cir. 1978); *United States ex. rel. Wright v. Woods*, 432 F.2d 1143 (7th Cir.), cert. denied, 401 U.S. 966 (1979).

Clearly, at least for federal law enforcement agents in the Ninth Circuit, the rule requiring a warrant existed prior to *Prescott*. The fact that cases prior to *Prescott* did not require the Ninth Circuit to definitively resolve the issue does not undermine the import of the distinct pronouncements on the issue.[9]

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[9]In the Brief for the United States, at 22, petitioner concedes that if the Ninth Circuit "had authoritatively held the conduct in question unlawful prior to the officers' action in a particular case" a reasonable basis for knowledge may be imputed to the officers. It is disingenuous for petitioner to argue that the Ninth Circuit had not authoritatively prohibited this conduct in light of its concession in *Calhoun* and Judge Ferguson's admonition in *United States v. Rombouts*, *supra*. If the government had any doubt whatsoever that an adverse decision on this issue was not forthcoming in *Calhoun*, the government would undoubtedly not have conceded the issue. It is virtually impossible to believe that the issue was not authoritatively resolved in the Ninth Circuit, albeit not by specific judicial pronouncement, prior to respondent's arrest. This conclusion is bolstered by the fact there were no cases in the Ninth Circuit after *Calhoun* where the government seriously argued that a warrant was not necessary to effect an arrest in a home absent exigent circumstances.

Contrary to petitioner's contention, there is no evidence that at the time of entry into respondent's home it was common practice among federal law enforcement agents in the Ninth Circuit to enter private dwellings to effect an arrest without a warrant.[10] As in *United States v. Ross, supra*, the facts of this case are easily distinguishable from *Peltier*. In *Peltier*, the practice had received continuous judicial approval and was based on a validly enacted statute. The proscribed conduct of the agents in this case and in *Payton* and *Prescott* was not authorized by statute and clearly did not have judicial approval. Accordingly, Agents Hemenway and Pickering were required to resolve their doubts, if any, in favor of obtaining an arrest warrant for respondent.

Although at the time of the *Payton* and *Prescott* decisions the majority of states that had previously taken a position on the issue of warrantless arrest entries into the home had permitted same, the decided trend in states determining the issue in more recent years was to declare said warrantless arrest entries unconstitutional. *Payton*, 445 U.S. at 598-599. As the Court in *Payton* remarked, "[v]irtually all of the state courts that have had to confront the constitutional issue

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[10]Agents Pickering and Hemenway were obviously aware of the necessity of obtaining an arrest warrant in absence of exigent circumstances by the fact that they secured an arrest warrant for respondent's co-defendant, Dodd. Petitioner's attempt to excuse Pickering and Hemenway from obtaining a warrant because they lacked supernatural prescience or could not have discerned the answer that would ultimately be given to the difficult question is patently absurd in light of the *fact* that they had obtained a warrant to arrest Dodd. If Pickering and Hemenway were capable of making such a momentous decision—to adhere to the warrant requirements for the Fourth Amendment—regarding Dodd, it is impossible to justify a different decision regarding respondent, especially when they knew that any arrest of respondent would probably occur in his home. [Tr. 140, 170]

directly have held warrantless entries into the home to arrest to be invalid in the absence of exigent circumstances." 445 U.S. at 599. Indeed, only the Supreme Court of Florida and the New York Court of Appeals in *Payton* had expressly upheld warrantless entries to arrest in the face of a constitutional challenge. Clearly, there was no existing state court authority upon which law enforcement officers could rely to support the constitutionality of warrantless home arrests.

Moreover, the California Supreme Court held in *People v. Ramey*, 16 Cal. 3d 263, 275-276, 127 Cal. Rptr. 629, 636-637 (1976), resting on both federal and state constitutional provisions, that warrantless arrests within the home are *per se* unreasonable in the absence of exigent circumstances. Although federal law, and not state law, is ultimately controlling on the issue of federal law enforcement agents' warrantless arrest entries, *Prescott*, 581 F.2d at 1348, it is well established that the law of the state where an arrest without warrant takes place may determine its validity in the absence of an applicable federal statute. *United States v. Di Re*, 332 U.S. 581, 589 (1948). *United States v. Watson*, 423 U.S. 411, 420-421 n.8 (1976); *Miller v. United States*, 357 U.S. 301, 305 (1958). Although *People v. Ramey* was not dispositive of the issue for federal law enforcement agents,[11] the decision was yet another significant signpost to federal agents, especially Secret Service Agents, who necessarily have a close working relationship with local law enforcement in the Ninth Circuit.

The Ninth Circuit's analysis in *United States v. Blake*, 632 F.2d 731 (9th Cir. 1980), applying *Prescott* retroactively, further demonstrates that, at least in the Ninth Circuit, law enforcement agents had sufficient knowledge or were charge-

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[11]It certainly was dispositive for Judge Ferguson. See footnote 8, *supra*.

able with knowledge that warrantless arrests were constitutionally impermissible.[12]

In *United States v. Blake, supra*, the court specifically found that *Prescott* was clearly foreshadowed in the Ninth Circuit:

> We readily acknowledge that these authorities [*Linkletter v. Walker*, 381 U.S. 618 (1965, *United States v. Peltier*, 432 U.S. 531 (1975)] could provide a basis for prospective application only of *Prescott* or *Payton* were we convinced that neither result was "clearly foreshadowed. On two occasions prior to *Prescott* we indicated that a warrant very likely was required to legitimate an arrest within a residence based on probable cause in the absence of exigent circumstances. *See United States v. Calhoun*, 542 F.2d 1094, 1102 (9th Cir. 1976), *cert. denied*, 429 U.S. 1064, 97 S.Ct. 792, 50 L.Ed. 2d 781 (1977); *United States v. Phillips*, 497 F.2d 1131, 1135 (9th Cir. 1974). In neither case was there a square holding to that effect, although in *Calhoun* both the government and the defendant apparently agreed that under such circumstances a warrant was required. In truth, as we indicated in *Prescott*, we avoided the issue repeatedly either by finding that probable cause to arrest was lacking or, when not lacking, that exigent circumstances existed. *Persistent avoidance signifies judicial sensitivity to the issue avoided and should alert reasonable observers to the distinct possibility that it might be decided in due course in the manner adverse to their interest.* This, we think, occurred prior to *Prescott* and constitutes a clear foreshadowing of that decision. (Footnote ommitted; emphasis added)

632 F.2d at 735-736.

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[12]Although the petitioner now strongly argues that *United States v. Blake, supra*, was erroneously decided, petitioiner chose not to file a petition for a writ of certiorari.

Petitioner argues that the principal defect in the Ninth Circuit's analysis in *United States v. Blake, supra*, relied on by the Ninth Circuit in this case, was that it confused the test to be applied in retroactivity cases not involving the exclusionary rule with the standard set forth in *Peltier*. In support of its criticism of *Untied States v. Blake, supra*, the petitioner again relies on Judge Wilkey's application of the *Peltier* test. However, the Ninth Circuit in *Blake* did apply the *Peltier* test in deciding to hold *Prescott* retroactive by its implicit analysis of the question of whether law enforcement officers in the Ninth Circuit should have had knowledge of the warrant requirement. The Ninth Circuit correctly resolved this question against the law enforcement officers by its alternative holding "that the 'law' prior to *Prescott* was as announced by *Prescott*." 632 F.2d at 736.

Similarly, the Fifth Circuit has acknowledged that *Payton* was not new law. In holding that a pre-*Payton* warrantless home arrest was illegal, relying on *Payton*, the court noted:

> The application of *Payton* to the instant case is not the retroactive application of a new rule. Indeed, in *Payton* the Court emphasized that it was simply clarifying what was already the law in most circuits. 445 U.S. at 557 and n.4.

United States v. Congote, 656 F.2d 971, 974 n.3 (5th Cir. 1981).

(3) BASED ON THE CONDUCT OF AGENTS PICKERING AND HEMENWAY, THE PURPOSE OF THE EXCLUSIONARY RULE WILL BE EFFICACIOUSLY SERVED IN RETROACTIVELY APPLYING *PAYTON* AND *PRESCOTT* TO THIS CASE

Assuming *arguendo* petitioner's position that the Court is precluded from inquiring if *Prescott* declared new law, the deterrent purpose of the exclusionary rule overwhelmingly supports retroactivity in light of the particular facts in this case. The arresting officers, Agents Pickering and Hemenway, were highly trained and experienced employees of the United States Secret Service. After they completed a lengthy and thorough investigation they concluded that there was sufficient evidence to file a criminal complaint and arrest respondent's co-defendant, Dodd. More importantly, they recognized that in absence of exigent circumstances or any other valid exception to the Fourth Amendment it was necessary to obtain an arrest warrant for respondent's co-defendant, Dodd. In light of their decision, they presented the results of their investigation to an Assistant United States Attorney who authorized the filing of a complaint against Mr. Dodd. Simultaneously with the filing of the complaint, the Magistrate issued an arrest warrant for Dodd. The decision to obtain an arrest warrant for Dodd certainy belies petitioner's argument that it is unreasonable "[t]o expect officers to be familiar with and conform their conduct to, subtle judicial nuances in the treatment of unsettled issues . . . ." Brief for the United States at 32. Moreover, Agents Hemenway and Pickering certainly were not guided or prompted by "dicta, hints, or precatory observations" in obtaining the arrest warrant for Dodd. *Ibid.* In fact, they wre guided by their obvious knowledge and understanding of the Fourth Amendment and the law of the Ninth Circuit which required them to obtain an arrest warrant in absence of exigent circumstances.

Given that Agents Pickering and Hemenway were sufficiently knowledgeable to obtain a warrant for Dodd, it is an incredible "exaggeration" by petitioner to believe "that when

Agents Hemenway and Pickering entered respondent's home and arrested him, their actions implicated a perplexing constitutional question that had dramatically divided scholars and jurists alike for many years" and that "[e]ven had they preceded their actions by a diligent study of legal authorities [they] . . . could not have discerned the answer that would ultimately be given to this difficult question . . . ." Brief for the United States at 21-22. Since Agents Hemenway and Pickering had absolutely no difficulty solving this allegedly perplexing constitutional question in Dodd's case, there is no reason to believe they could not have also similarly resolved the question in respondent's case. The agents were not in the field responding quickly to fast moving, unpredictable events. They were in the solemnity of the United States Attorney's office where, if Agents Pickering and Hemenway were truly not capable of resolving this constitutional dilemma, they could have requested advice from the Assistant United States Attorney assigned to their case.[13]

It is apparent tha the only reason that Agents Pickering and Hemenway did not secure an arrest warrant for respondent

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[13]Of course, the Assistant United States Attorney would have been fully aware of Judge Ferguson's position in *United States v. Rombouts*, United States District Court No. C.R. 1540-F.

was that they were of the opinion that they did not have adequate probable cause to arrest respondent.[14]

In analyzing whether the policy of the exclusionary rule would be undermined by affording respondent the benefits of the retroactive application of *Payton* and *Prescott*, it is important to closely scrutinize the conduct of Agents Hemenway and Pickering after they left the Assistant United States Attorney's office.[15]

According to the testimony of Agent Hemenway, the agents' intent prior to going to respondent's home was to arrest him "depending upon the degree of his statements." [Tr. 140][16] The record also demonstrates that while surveilling

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[14]Agent Pickering testified as follows:

Q Did you go there for the purpose of effecting an arrest on Mr. Johnson?

A At the time we entered the residence, no.

Q Why not?

A Because we felt or I felt that we didn't have enough probable cause to make an arrest yet.

Tr. 167.

Although the district court refused to allow trial counsel to fully explore the conversations between Agent Hemenway and the Assistant United States Attorney that authorized the complaint against Dodd [Tr. 140], we strongly suspect that the Assistant United States Attorney advised Agent Hemenway that in the absence of admissions by respondent a complaint or arrest warrant for respondent would not be authorized because there was insufficient probable cause.

[15]We strenuously disagree with petitioner's statement that the "good faith" of Agents Hemenway and Pickering cannot be seriously questioned.

[16]There is an obvious conflict in the evidence regarding petitioner's contention that the agents went to respondent's home merely to question him. In that regard, the agents' outrageous conduct once inside respondent's residence is inconsistent with petitioner's statement that the agents merely wanted to question him.

respondent's home they observed respondent's car pull into his driveway. Rather than interrogate respondent in his driveway, the agents allowed respondent and his wife to enter his residence. [Tr. 498] Once respondent was "safely" inside his home, the agents, with guns drawn and using a fictitious name, knocked on the door and gained entry into respondent's home pursuant to respondent's "invitation". After entering respondent's home, Agent Hemenway, with his gun still drawn, ordered respondent into the bedroom for questioning and ordered respondent's naked wife to dress and come out of the bedroom into the living room. [Tr. 115; 505-506] Immediately after entry and prior to questioning respondent, the agents conducted a "cursory search" of respondent's home.[17] [Tr. 115, 135] Shortly thereafter, respondent allegedly explained his involvement with the Treasury Check and he was formally arrested.[18]

The "good faith" of Agents Hemenway and Pickering is highly suspect in light of the agents' actions after gaining access to respondent's home. The agents' cursory search of

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[17]Petitioner erroneously contends that the agents conducted a brief security check once inside the home. The record is clear that Agent Hemenway conducted a "cursory search" of respondent's home. [Tr. 115, 135].

[18]It is impossible to square the agents' conduct with the remarks attributed to William Pitt, Earl of Chathan, quoted in *Prescott*:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement! (footnote omitted)
>
> It was on the same occasion that Pitt said, "Every man's house [is] his castle." *id.*, fn. 7.

581 F.2d at 1343.

respondent's home and their outrageous conduct in commandering respondent and his wife in their own home should not be tolerated in light of the alternative of questioning respondent outside his residence.[19] In addition to the agents' failure to obtain an arrest warrant for respondent, the deliberate and cavalier disregard for respondent's rights should be alone sufficient reason to justify the suppression of the evidence in this case. Consistent with *Peltier*, this is precisely the type of case where the purposes of the exclusionary rule—deterrence of unlawful police conduct and preservation of judicial integrity—would be served by affirming the Ninth Circuit's decision to afford respondent the retroactive benefits of *Payton* and *Prescott*.

B. *THE FACT THAT RESPONDENT'S CASE WAS PENDING ON DIRECT REVIEW WHEN PAYTON AND PRESCOTT WERE DECIDED REQUIRES THE SUPPRESSION OF EVIDENCE ILLEGALLY OBTAINED*

It is well-settled that a change in the law will be given retroactive effect to a case pending on direct review at the time of the decision. *Thorpe v. Durham Housing Authority*, 393 U.S. 268, 281-282 (1969). *Linkletter v. Walker*, 381 U.S. 618, 627 (1965). This principle applies whether or not the new law is expressly made applicable to pending cases. See *Bradley v. Richmond School Board*, 416 U.S. 696, 711-716 (1974). This principle is unquestionably applicable to

[19]It is not difficult to imagine that the agents, knowing that respondent had used heroin in the past [Tr. 117], wanted to gain entry into respondent's home hoping to find him in possession of narcotics.

the instant case which was pending on direct review at the time of the *Payton* and *Prescott* decisions and the Ninth Circuit did not err in applying *Payton* and *Prescott* to the case *sub judice*. The inherent injustice that results in refusing to apply the princples of a newly decided case to one pending before the same court on the same issues compels application of *Payton* and *Prescott* to this case.

Respondent's plight is substantially similar to the defendants in *Payton* and *Prescott*. In all three cases the defendants were subject to warrantless arrests in their homes during the period 1977 through early 1978. Each defendant attempted to suppress the fruits of illegal arrest entries. The defendants in *Payton* and *Prescott* enjoy the retroactive application of the constitutional principle announced in their cases. Additionally, the defendant in *United States v. Blake*, 632 F.2d 731 (9th Cir. 1980), who was arrested in November 1977 (6 months subsequent to respondent's arrest) enjoys the benefit of *Prescott* and *Payton*. The refusal to afford respondent the benefit of the retroactive application of *Payton* and *Prescott* results in the unequal administration of justice which result should be scrupulously avoided.[20]

It is also significant that prior to this case the Court had applied *Payton* to other cases pending on direct review on the date of the decision. In *Steagald v. United States*, 101 S.Ct. 1642 (1981), the Court relied on principles reiterated in *Payton* to hold a warrantless search prior to the *Payton*

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[20]As summarized by Justice Powell in *Hankerson v. North Carolina*, 432 U.S. 233, 247-248 (1976) (Powell, J., concurring):

> When the Court declines to hold a new constitutional rule retroactive, one chance beneficiary—the lucky individual whose case was chosen as the occasion for announcing the new principle—enjoys retroactive application, while other similarly situated have their claims adjudicated under the old doctrine. This hardly comports with the ideal of administration of justice with an even hand.

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decision unconstitutional, which action at the least signals an implicit acknowledgement of applicability of *Payton* to cases pending on direct review. Moreover, since *Payton*, the Court has vacated judgments in a number of cases. See, e.g., *Bush v. Florida*, 446 U.S. 902 (1980) on remand, *sub. nom. Busch v. United States*, 392 So. 2d 272, (Fla. Dist. Ct. App. 1980); *Brown v. Florida*, 446 U.S. 902 (1980), cert. pending, No. 80-1644, filed March 27, 1981.

Even more compelling is the Ninth Circuit's reliance on *Payton* and *Prescott* to cases pending on direct review since the decisions were announced. *United States v. Stubblefield*, 621 F.2d 980 (9th Cir. 1980); *United States v. Gray*, 626 F.2d 102 (9th Cir. 1980). See also: *Untied States v. Valasquez*, 626 F.2d 314 (3rd Cir. 1980);' *Wagner v. Bonner*, 621 F.2d 675 (6th Cir. 1980); *Wallace v. King*, 626 F.2d 1157 (4th Cir. 1980).

This case is closely akin to *Linkletter v. Walker*, 381 U.S. 618 (1965) and *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966). In *Linkletter*, the Court in deciding the non-retroactivity of *Mapp v. Ohio*, 367 U.S. 643 (1961) to final judgments, affirmed the applicability of *Mapp* to cases pending on direct review at the time of the decision.[21]

Similarly, in *Tehan v. Shott, supra*, it was held that the new rule declaring it unconstitutional for a prosecutor or judge to make adverse comments upon a defendant's failure to testify in a criminal trial was not entitled to retroactive application in cases in which the judgment of conviction had been final before the date of the decision. However, the Court noted that the new rule was properly applied in the case announcing the

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[21] *Mapp* had been applied in *Ker v. California*, 374 U.S. 23 (1963), *Fahy v. Connecticut*, 375 U.S. 85 (1963), and *Stoner v. California*, 376 U.S. 483 (1964).

rule and in other cases pending on direct review at the time the rule was announced. *O'Connor v. Ohio*, 382 U.S. 286 (1965) (per curiam).

This Court and the Ninth Circuit have repeatedly applied *Payton* and *Prescott* to cases *sub judice*. Particularly here, where the Ninth Circuit has expressly held in *United States v. Blake, supra*, that *Prescott* must be applied retroactively, 632 F.2d at 735-736, the Ninth Circuit's decision must be affirmed.

> If a "new" constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced. Anything else would belie the truism that it is the task of this Court, like that of any other, to do justice to each litigant on the merits of his own case. It is only if our decisions can be justified in terms of this fundamental premise that they may properly be considered the legitimate products of a court of law, rather than the commands of a super-legislature.

Desist v. United States, 394 U.S. 244, 259 (1969) (Harlan, J., dissenting).

Petitioner argues that regardless of the retroactivity analysis for other constitutional decisions, the pendency of a Fourth Amendment exclusionary rule case on direct review should have no bearing on the determination of the retroactivity of a newly decided Fourth Amendment principle. Again, the pivotal issue is whether the principle involved is "new" or constitutes a sharp break in the law.

In virtually every case where the Court has sanctioned prospective application only of a new constitutional principle a previous decision of the Court had been expressly overruled. See *Williams v. United States*, 401 U.S. 646 (1971) regarding the retroactivity of *Chimel v. California*, 395 U.S. 7542 (1969), which overruled *United States v. Rabinowitz*,

339 U.S. 56 (1950) and *Harris v. United States*, 331 U.S. 145 (1947); *Fuller v. Alaska*, 393 U.S. 80 (1968) (*per curiam*) involving the retroactivity of *Lee v. Florida*, 392 U.S. 378 (1968) which overruled *Schwartz v. Texas*, 344 U.S. 199 (1952); *Desist v. United States*, 394 U.S. 244 (1969) involving the retroactivity of *Katz v. United States*, 389 U.S. 347 (1967) which specifically rejected *Goldman v. United States*, 277 U.S. 129 (1942) and *Olmstead v. United States*, 277 U.S. 438 (1928); *Daniel v. Louisiana*, 420 U.S. 31 (1975) regarding the retroactivity of *Taylor v. Louisiana*, 419 U.S. 522 (1975) which disapproved *Hoyt v. Florida*, 368 U.S. 57 (1961).

The principle articulated in *Payton* and *Prescott* did not overrule past precedent and was clearly foreshadowed. In this respect, this case is distinguishable from the plethora of cases cited above and both *Peltier* and *Brown v. United States*, 422 U.S. 916 (1975) which denied retroactive application of *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) to searches occurring prior to the decision, even though the cases were pending on direct review. An analysis of *Bowen* and *Peltier*, both exceptions to the general rule of applicability of new principles to cases pending on direct review, manifestly exposes the misplaced reliance of petitioner herein. *Bowen* and *Peltier* were based on the Court's conclusion that "[i]t was in reliance upon a validly enacted statute, supported by long-standing administrative regulations and continuous judicial approval that border patrol agents stopped and searched. . . ." *Peltier* at 541. As the *Peltier* dissent pointedly noted, the analysis was a startling departure from the settled principles established in *Linkletter* and it was not justified notwithstanding the strong reliance by law enforcement officers on the purported longstanding regulations and judicial approval. 422 U.S. at 550-551.

Similarly, in *Brown v. Louisiana*, 447 U.S. 323 (1980), the Court granted retroactive application of the constitutional principle announced in *Burch v. Louisiana*, 441 U.S. 1326 (1979) (a defendant's conviction of a nonpetty criminal offense by a nonunanimous six-person jury violated the accused's right to trial by jury) emphasizing the minimal justifiable reliance on the old standards. "Unlike other cases that have been accorded prospective effect only, *Burch* did not overrule any prior decisions of this Court or invalidate a practice of heretofore unquestioned legitimacy." 447 U.S. at 335.

In light of the fact that *Payton* and *Prescott* did not overrule prior decisions of the courts and merely reaffirmed existing constitutional principles, a departure from the well-settled principle applying new decisions to cases pending on direct review is not warranted.

If the Court is not persuaded to apply the principles of *Payton* and *Prescott* retroactively to all cases, at a minimum, it should affirm the Ninth Circuit's decision applying *Payton* and *Prescott* to this case is *sub judice*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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